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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York, FRANK V. PONTERIO and ROBERT A. STRANIERE,

Appellants.

– against –

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED:

Whether New York City's most powerful governmental body -- the Board of Estimate -- violates equal protection in that it is comprised of three members at-large and five members from five equally represented districts, the largest of which contains six times the population of the smallest.

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CONSTITUTIONAL AND NEW YORK CITY CHARTER PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

The New York City Charter states:

Section 61: Membership. The mayor, the comptroller, the president of the council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: Voting in the Board.

a. As members of the board of estimate, the mayor, the comptroller and the president

of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public.

Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT OF THE CASE

Appellees move, in accordance with Rule 16 of this Court, to affirm the judgment of the United States Court of Appeals for the Second Circuit. The judgment of the Second Circuit Court of Appeals that the present representational configuration of the Board of Estimate violates the one person, one vote principle of the equal protection clause is so clearly correct that it presents no substantial federal question for appeal. There is no factual dispute* and there are no opinions in conflict with that of the circuit court.

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* The jurisdictional statement filed by Appellant Frank Ponterio asserts that factual disputes should have precluded summary judgment in the courts below. Ponterio ignores his and all other parties February 13, 1985, stipulation that the submissions to the district court constituted the factual record which was not in dispute, and which was, therefore, ripe for summary judgment.

Moreover, as is demonstrated below, there has perhaps never been a clearer violation of equal protection in voting rights at the local level than that presented by the current representational configuration of New York City's Board of Estimate.

This case challenged the representational scheme of New York City's Board of Estimate. The plaintiffs successfully argued in both courts below that equal representation from each of five borough districts which vary in population from 350,000 to 2.2 million violated equal protection; that the Board of Estimate representational scheme, which petrifies, for all time, representation by one delegate with one vote for each of the five boroughs no matter how New York City's population shifts, violates the very essence of the one person, one vote guarantee.

Simply put, the plaintiffs' case from the outset sought to reaffirm this Court's oft repeated proposition:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.

Reynolds v. Sims, 377 U.S. 533, 562 (1964).

Nevertheless, also from the outset, the defendants have engaged in legal gymnastics to escape the plain import of the equal protection doctrine as applied to voting, that "the weight of a citizen's vote cannot be made to depend on where he lives." Id. at 567.

To this end the defendants have proffered several complex, unprecedented, hybrid mathematical approaches to voting rights analysis in an attempt to dilute and minimize the six to one population disparity between the Brooklyn borough district and the Staten Island borough district. The defendants' mathematically creative initiatives have been offered as a result-oriented substitute for the Court's standard, straight-line arithmetic

methodology universally recognized and accepted: the Abate test. Abate v. Mundt, 403 U.S. 482 (1971).

The defendants' alternative approaches have employed two basic devices: (1) an attempt to transport the crucial mathematical inquiry from population per district representative, to population per "decisive" or "critical" vote on matters that come before the Board of Estimate (the Banzhaf method)*; and, (2) an attempt to

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* See, Banzhaf, One Man,? Votes: Mathematical Analysis of Voting Power and Effective Representation, 36 Geo. Wash. L. Rev. 808 (1968). The Banzhaf method of evaluating voting inequality compares population per district with the number of tie-breaking votes a district's representative controls in his or her role as legislator. It is, alternatively, characterized as a "power index" rather than an equal representation formula. It is purely theoretical and does not account for any political factors in measuring a legislator's voting power. See, Whitcomb v. Chavis, 403 U.S. 124, 145-146 (1971) and the circuit court's opinion herein, at pp. 21-30, Appendix to Appellants' Jurisdictional Statement.

minimize mathematically the six to one population deviation between districts by injecting the presence of the three at-large representatives into the voting equality calculation.

Under the defendants' modified Banzhaf Power Index the deviation they claim is 30.8%. Under the Court's traditional Abate methodology, the deviation is 132.9%.

In addition, the defendants persist in attempting to create a mythology of virtuous homilies about the Board of Estimate's success in governing New York City. This approach amounts to an emotional appeal focusing on the old adage, invoked on behalf of the defendants' self-serving point of view, that "if it ain't broke, don't fix it." Given the long history of educational, racial, economic, ethical, land development, employment and housing failures of New York City government, this argument has an other-worldly timbre to it.

At bottom, the defendants' case concedes intolerably large deviations from representational equality, but would have this Court uphold the Board of Estimate electoral scheme by, in essence, abandoning for local governing bodies, one person, one vote precedents. The import of this defense is to seek for the Court to reverse, sub silentio, its landmark ruling in Avery v. Midland County Commissions Court, 390 U.S. 474 (1968), requiring local governmental bodies to conform to one person, one vote principles.

The defendants also argue, as they did below, that several available alternative Board of Estimate representational schemes, which would satisfy both voting equality and the interests identified by the defendants as crucial to governing New York City, need not be considered by the Court. They would have this Court ignore the least drastic alternative rule adopted for redistricting cases in Karcher v.

Daggett, 462 U.S. 725, 741 (1983); Connor v. Finch, 431 U.S. 407, 420 (1977) and Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967). The defendants' factual assertion that the current Board of Estimate voting scheme is uniquely suited to the needs of governing New York City, notwithstanding its fundamentally anti-democratic structure, was flatly rejected by the courts below (98-110).*

The opinion of the circuit court is instructive in analyzing each of the defendants' three assertions in this Court. Both the district and circuit courts found that mathematical approaches which analyzed equal voting rights in terms of a voter's so-called influence over Board

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* Numbers in parenthesis refer to the lower court opinions contained in Appellants' Jurisdictional Statement.

of Estimate decisions -- rather than under the Abate method in terms of population per representative -- were inappropriate indices. The circuit court, citing and quoting the rejection of the Banzhaf approach by this Court in Whitcomb v. Chavis, 403 U.S. at 129, 144-146, concluded:

> We are similarly persuaded that the Banzhaf index is an insufficiently realistic measure of voter equality to provide the basis of a Fourteenth Amendment analysis of voter equality. It is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate. As a result, the Banzhaf index does not sufficiently reflect "[t]he real life impact of [the makeup of the Board of Estimate and the way its members are elected] on individual voting power ... to warrant departure from prior cases." Id. at 146 (24).

Similarly, both the district and the circuit courts rejected the defendants' foray into another novel mathematical "imbroglio," Mahan v. Howell, 410 U.S. 315, 319 n.6 (1973), in which defendants attempt to inject the presence of the three city-wide officials to dilute traditional computations of voting inequality based on borough districts which vary in population by a factor of six.

By contrast the circuit's approach analyzed the representational realities and responsibilities of Board membership in politically savvy, rather than theoretical, terms. The circuit court scrutinized the borough presidents' institutionally powerful role in serving their respective electorates. It found that their borough focus is in stark contrast to the city-wide allegiances and city-wide perspective of the at-large officeholders who are Board members.

The circuit court applied this representational analysis to reach a decision on the appropriate mathematical approach:

> Here the Board members primarily represent the different constituencies that elect them. The borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have qua residents of a particular borough. The city-wide members, on the other hand, must be supposed to transcend such purely local interests, and to represent primarily the interests of their constituents qua residents of New York City. There is no fiction involved in saying, for instance, that an individual resident of Brooklyn may have distinct and potentially differing interests qua Brooklyn resident and qua New York resident. For example, from the point of view of the city as a whole, the best place for some necessary but locally-disruptive facility e.g., a toxic waste dump, might be in Brooklyn, whereas

> from the point of view of a Brooklyn resident who lives in the neighborhood of the proposed facility the site selected may appear to be the worst possible one. It has been the function of the Board of Estimate, consisting of representatives of each interest, to judge between them and to solve the coordination problems that otherwise would arise between the boroughs.
>
> Viewing the Board in this light, we hold that in calculating voter equality for equal protection purposes the city-wide members should be, if not ignored, not considered in the appropriate analysis (footnote omitted, citations omitted) (32-33).

Both the district and circuit courts rebuffed the defendants' attempt to elevate the representation of "interests" above the representation of voters. The defendants' contention that population equality could be denied voters based solely on the questionable assertion that a governmental body "effectively"

serves the interests of the localities which comprise New York City, did not sit well with either court. Obviously, effectiveness is a much debatable political point.

The circuit court reduced the defendants' argument to the following analysis:

> We wish to make it plain that we use the concept of "interest representation" in this case only in order to determine how the Board is to be qualified for the purpose of applying the Abate test, a test that itself measures the representation of people, not of interests. Our approach is thus in accord with what has been the Supreme Court's insistence that the Equal Protection clause requires the equalization of voter representation, not interest representation ... On the contrary, the Board's argument, for example, that "[r]eapportionment according to exact population ... would reduce the Staten Island borough president to the status of a bystander in the

> Board's deliberating" obviously is thinking of equal protection in terms of equal representation of interests -- here borough interests. That view, in light of Reynolds and its progeny, is untenable. The design of the Board, which gives equal weight to each borough's interests, has devalued concomitantly the votes of individual residents of Brooklyn and Queens, and has grossly overvalued the votes of Staten Island residents. The result is exactly what the Equal Protection clause forbids: "the elevation of a small class of 'supervoters' granted an extraordinarily powerful franchise." Brown v. Thomson, 462 U.S. 835, 856 (1983) (Brennan J. dissenting) (certain citations omitted) (emphasis in original) (34-35).

Finally, the circuit court adopted the district court's reasoning in finding that the appropriate analytical framework in the area of the fundamental right to vote required inquiry

into available alternative representational schemes that served the City's interests and minimized voting inequality. The court found:

> Beyond weighing the asserted justifications, the district court scrutinized alternatives, pursuant to Connor v. Finch, 431 U.S. 407, 420 (1971) and Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967). See, 647 F. Supp. 1475-78. The court found that alternatives "have been suggested that would 'substantially vindicate' the accepted policies and interests yet approximate population equality more closely'" 647 F. Supp. at 1478 (quoting Karcher, 462 U.S. at 471). It held that the "existing plan with its much greater departure from franchise equality does not advance the valued policies and interests." (38-39).

The sum and substance of the circuit's conclusion remained identical to that of the district court:

> It follows that, since the interests of Staten Island residents qua residents of that borough have substantially identical representation on the Board to those of residents of Brooklyn, though Brooklyn is six times as populous as Staten Island, there are serious inequalities in the representation of residents of different boroughs. Indeed, this is what the Abate test demonstrates and quantifies, a 132.9% maximum deviation from voter equality. (33-34)

Notably, concurrent with the circuit court's consideration of this case, the defendants have already set a course which will, in all likelihood, provide a remedy for the voting inequality inherent in the Board's current representational scheme as early as January 1, 1989. In December, 1986, the Mayor empanelled a charter revision commission which will place before the voters on the November, 1988, ballot, propositions for reform of the

Board of Estimate. Charter revision is the political system's search for a constitutionally viable alternative scheme of representation.

The Charter Revision Commission has already completed its first round of public hearings. Draft ballot proposals are expected this Spring. Regardless of the outcome of this litigation, reform of the Board of Estimate is all but assured. New York City's political process for institutional change has overtaken these proceedings.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY BASED ITS DECISION ON THE ABATE METHOD OF MEASURING VOTING INEQUALITY

The Abate test, measuring straight-line arithmetic deviations from equal population per districts, has been the standard measuring stick in apportionment controversies since 1971. See Abate v. Mundt, supra; Gaffney v. Cummings, 412

U.S. 735, 737 (1973); Brown v. Thomson, 462 U.S. 835 (1983). The adoption of the Abate test must be viewed as more than merely choosing a mathematical option for the sake of convenience and simplicity, and more than a mere "demonstrated impatience with mathematical metaphysics" sometimes offered by creative litigants in voting rights controversies. Mahan v. Howell, 410 U.S. at 319, n.6.

By measuring percentage deviations of district populations from a norm district, and judging voting inequality on this basis alone, the Abate test avoids the intrusion of other mathematical methods, such as the Banzhaf Power Index, into sensitive, non-justiciable areas involving the inner-workings of the legislative process.

Since the one person, one vote doctrine at its inception had as its biggest hurdle the Court's reluctance in Baker v. Carr, 369 U.S.

186, 217-37 (1962) to tamper with the competing constitutional principles of separation of powers and the political question doctrine, the Abate methodology can be viewed as the analytical tool which least intrudes upon the sacrosanct and politically complex institutional voting practices and rules of legislative bodies. By measuring only those aspects of the voting process which involve citizens and their equal representation by their legislators, rather than the interstices of legislative decision-making, the Abate test steers the courts clear of legislative immunities, political questions and separation of powers thickets.

For the case in point, Abate is plainly the proper measure. The Board of Estimate is comprised of five districts of unequal size and three at-large representatives. The unequally populated districts are equally represented by

borough presidents, whose functions and duties on the Board, and whose role with respect to their constituents, differ dramatically from those of the at-large Board representatives.

Moreover, no measure, other than the Abate methodology, permits rational comparison and evaluation under the applicable precedent of this Court. Under Abate the deviation from a norm of voting equality is 132.9%, far greater than the 10% deviation permitted by the Court's applicable precedent. See, Brown v. Thomson, 462 U.S. at 850.

A. The Banzhaf Power Index is Not Reflective of the Actual Voting Dilution Inherent in the Board of Estimate's Representative Scheme

In Whitcomb v. Chavis, 403 U.S. 124 (1971), the Court evaluated the Banzhaf approach to the analysis of Indiana's multimember electoral districts. The plaintiffs sought invalidation of that scheme on the basis that in

multimember districts each individual voter had a greater influence over "critical" votes -- votes that decide elections -- than the voters in Indiana's single-member districts. Moreover, some plaintiffs in Whitcomb argued that under the Banzhaf analysis, voters in multimember districts, with more representatives than voters in single-member districts, had more influence over "critical" -- tie breaking -- votes in the state legislative process.

The Court did not dispute the theoretical accuracy of the plaintiffs' Banzhaf analysis in Whitcomb. Nevertheless, the Court viewed the approach as too abstract, failing to account for "any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting

characteristics or any other factors which go into the entire political voting situation." 403 U.S. at 146.

The Banzhaf theory assumes equal probability of each possible voting outcome. This is plainly not the case among voters. It is even more plainly not the case for analyzing voting patterns of the City officials who sit on the Board of Estimate. Defendants' reliance on this assumption is a fatal flaw in their attempt to adapt Banzhaf to the Board of Estimate scheme.*

As the defendants repeatedly assert, and concede, the Board operates by deeply ingrained traditions: i.e., borough presidents

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* Notably, Professor Banzhaf filed an amicus brief in the district court concluding that even under proper application of his methodology, the Board of Estimate did not comply, in his view, with one person, one vote equality. Banzhaf Amicus at pp. 37, 39.

vote, whenever possible, as a bloc, giving deference to the borough affected; the city-wide officials are affected by their political ambition to be mayor or remain mayor; votes are traded on many issues; unanimity generally reigns under the Board's practice of pre-arranging votes.

As the circuit court concluded:

> As the Board itself argues in its brief, "any mathematical device to measure discrimination in voting must bear a resemblance to the way the process really works." The Banzhaf index urged upon us by the Board makes unrealistic assumptions as applied in this case and accordingly does not pass that test.... [L]ike the Court in Whitcomb, given the problems we have noted with Banzhafian analysis, we see insufficient reason "to depart from prior cases." (28-29)

B. The Defendants' Attempt to Modify the Banzhaf Analysis to Incorporate the Mathematical Effect of the At-Large Board Members was Properly Rejected by the Courts Below

The defendants assert that under a sui generis, modified Banzhaf Power Index the measure of voting inequality is 30.8%.* Assuming for a moment that the defendants' ad hoc approach had some validity as a measure of voting inequality, which we dispute below, this

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* The 30.8% figure was arrived at by calculating the Banzhaf power of a citizen to elect a borough president in Brooklyn as compared to the power to elect a borough president in Staten Island and adding a factor of deviation of the varying powers of these representatives to influence critical votes on the Board of Estimate when they sit alongside the at-large members. Neither Banzhaf nor any other voting expert has ever previously constructed an analogous approach to a voting rights controversy.

figure of 30.8% is not comparable to the deviations surveyed in Brown v. Thomson, supra, or other Abate test cases.

This 30.8% measures an idiosyncratic, hybrid amount of voting power deviation which is irrelevant to other results under the standard measures which compare varying populations per district under Abate. Thus, at the outset, the defendants' claim that the current Board configuration contains deviations which must be considered as "approaching" tolerable limits of voter equality is like contending that a kangaroo should compete in a horse race.

A far more serious flaw in defendants' mathematical methodology, however, is attempting to dilute the gross deviations from voting equality inherent in the current Board scheme by injecting the presence of the three at-large Board members into the measure of population deviations between the boroughs. With each

at-large member having two votes on the Board and with one vote for each borough president, this argument has a superficial appeal. But again this methodology seeks to measure apples along with oranges.

All the evidence supports, and the defendants repeatedly concede, that the two types of Board representatives -- city-wide and borough -- serve very different functions. The at-large are each running for Mayor or seeking to retain the office of Mayor, as the case may be, and thus each is pre-eminently a city-wide politician with a city-wide orientation. The at-large amalgamate the interests of the City as a whole. (30-33)

For the borough presidents, quite the opposite is the case. The borough presidents are the only local representatives citizens have on the issues that count -- economic issues -- within a heavily centralized City governmental

scheme. Though in the case of the four large boroughs each borough president must amalgamate conflicting interests within the borough, there is no dispute that the borough presidents attempt to focus on local problems.

As such, the borough presidents align together on the Board. They defer to one another. They wield their power as a bloc whenever possible. They try to entice one city-wide official and then run the show. In no sense, however, is it proper to compare their functions or role with the at-large members of the Board. (30-33)

Just as this Court did not account for the at-large seat when computing voting inequality in Avery v. Midland County, supra, so too have lower courts not accounted for at-large seats in Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975); Markoe v. Legislature of Virgin Islands, 592 F.2d 188 (3rd Cir. 1979);

Latino Political Action Committee, Inc. v. City of Boston, 568 F.Supp. 1012 (D. Mass. 1982); Cohen v. Maloney, 410 F.Supp. 1147 (D. Del. 1976); Grisbaum V. McKeithen, 336 F.Supp. 267 (E.D. La. 1971); Oliver v. Board of Education, 306 F.Supp. 1286 (S.D.N.Y. 1969).

Therefore, the defendants' attempt to amalgamate the at-large Board members into the mathematical analysis of the borough presidents' representation, with the concomitant effect of diluting the gross deviations from voting equality, is simply untenable.

As the circuit court stated below:

> [W]e hold that in calculating voter equality for equal protection purposes the city-wide members would be if not ignored, not considered in the appropriate analysis. (33).

II. THE AVAILABILITY OF ALTERNATIVE REPRESENTATIONAL SCHEMES WHICH SERVE THE CITY'S INTERESTS AND MORE CLOSELY APPROACH POPULATION EQUALITY WAS A PROPER BASIS FOR THE COURTS BELOW TO INVALIDATE THE CURRENT REPRESENTATIONAL SCHEME OF THE BOARD OF ESTIMATE

The principle of exploring alternative, more equitable voting plans arises from the logic of the Court's reasoning in cases as early as Wesberry v. Sanders, 376 U.S. 1, 78 (1964) in which the Court stated "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." In Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969), the Court "permit[ted] only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown." See, also, Mahan v. Howell, 410 U.S. at 320-21.

This doctrine is a direct logical outgrowth of the notion that equal voting strength is a fundamental right. Wesberry v. Sanders; supra, Reynolds v. Simms, supra; Kramer v. Union Free School District, supra; Dunn v. Blumstein, 405 U.S. 330 (1972).* And, in Karcher v. Daggett, 462 U.S. 752, 741 (1983), the Court articulated the propriety of evaluating alternative

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* That the test is not articulated in the traditional language of "the least drastic or restrictive alternative," as commanded by Dunn v. Blumstein, 405 U.S. 330 (1972), as it is for other voting rights cases, however, is quite understandable given the sliding burden of justification for deviations. When the quantitative deviations are minor (for local and state government less than 10%) the burden to explore alternatives is light or non-existent. When the deviations from equal voting strength exceed 10% the requirement to justify such deviations by legitimate policies and interests is triggered. And for deviations under the Abate test above 20%, to date, no justification has ever been accepted.

schemes in one person, one vote litigation. Thus, the Court observed:

> The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors. (Emphasis added).

See also 462 U.S. at 742, fn.12.

In Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967), the same reasoning was applied to a state legislative plan in Texas. And, in Hawaii, an opportunity to draw substantially more equal districts led a district court to conclude that the state's policies and interests were not furthered by the challenged plan. Travis v. King, 552 F.Supp. 554, 561-62 (D.Hawaii 1982); see also Justice Brennan's dissent in Brown v. Thomson, 462 U.S. at 852, reviewing reapportionment analysis and citing Mahan v. Howell, 410 U.S. at 319-20; and Connor v. Finch, 431 U.S. 407, 420-21 (1977)("In the absence of a convincing justification for its continued adherence to a plan that even in state policy terms is less efficacious than another plan actually proposed, there can be no alternative but to set aside the District Court's decree...")

The circuit court, in this case, adopted the district court's view of the necessity for consideration of alternatives more equitable than the schedule defended. It cited Kilgarlin v. Hill, supra, and Connor v. Finch, supra, for the district court's conclusion "that alternatives have been suggested that would 'substantially vindicate' the accepted policies and interests 'yet approximate population equality more closely.'" 647 F.Supp. at 1478 (quoting Karcher, 462 U.S. st 741)." (38)

In the case of the Board we have a petrified scheme which has never been reapportioned. Defendants would have the court analyze the Board in the context of their much exaggerated, much emphasized, paramount municipal interests in boroughs as absolutely co-equal localities.

In virtually every other reapportionment case, alternative plans are inevitably under consideration. It would be ironic, to say

the least, if defendants were to benefit from their failure to explore alternative plans just because this case poses a challenge to a static electoral scheme which has never been evaluated as part of periodic reapportionment.

It would also be ironic if valid available schemes that maximize local representation in the context of a highly centralized urban government were not evaluated. Weighted votes, more Board members for the larger boroughs, reapportioned districts, new super-majority voting rules, proportional representation and many other creative alteratives, which are not infected with equal protection defects but which serve the City's needs, are plans that the courts below found could satisfy appellants' valid interests. In light of these alternatives, a static scheme that violated equal protection can not withstand scrutiny.

III. THIS COURT SHOULD AFFIRM IN LIGHT OF THE CURRENT WORK OF THE NEW YORK CITY CHARTER REVISION COMMISSION WHICH, AS A RESPONSE TO THE LOWER COURTS' OPINIONS IN THIS CASE, IS IN THE PROCESS OF REFORMING THE REPRESENTATIONAL SCHEME OF THE BOARD OF ESTIMATE

Consonant with the Court's general policy to avoid disputes which are on the verge of resolving themselves, affirmance of the judgment below will permit New York City's Charter Revision Commission to complete its task of putting before the voters alternative representational schemes for the Board of Estimate.

The November, 1988 elections -- just nine months away -- will, in all likelihood, moot this case. Charter revision will place before the voters a new, presumably constitutional, scheme of representation for New York City government. Catapulting this imminent, well-ordered political reform process into disarray, by accepting this case for plenary review, will be by far the worst result

for New York City. Summarily affirming, at this point in the reform process, will be the result most consistent with this Court's comity concerns, especially with respect to supporting orderly political change consistent with constitutional doctrine at the local government level. Abate v. Mundt, 403 U.S. 182 (1971).

As the Court stated in Avery:

> The Sailors [v. Board of Education, 387 U.S. 105 (1967)] and Dusch [v. Davis, 387 U.S. 112 (1967)] cases demonstrate that the constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government ... Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

390 U.S. at 486-87

Since the lower courts have ruled on behalf of the citizens of New York City that the "single-member [borough] districts [can not be] of substantially unequal population" the Court's task is complete. To grant plenary review would be to frustrate the Court's stated goal to refrain from erecting "roadblocks in the path of [the] innovation, experiment, and development ..." undertaken by New York City's Charter Revision Commission.

CONCLUSION

For all of the foregoing reasons, appellees respectfully submit that the appellants have presented no substantial federal question for the decision of this Court and that the judgment entered by the circuit court should therefore be affirmed.

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